Appendix A

Opinion Below

New York Supreme Court, Appellate Division,
First Judicial Department

Harold A. Stevens, J.P.,
Arthur Markewich,
Louis J. Capozzoli,
Emilio Nunez,
Paul J. Yesawich, Jr., JJ.

1760

DOMINIC S. RINALDI,

Plaintiff-Respondent,

against

THE VILLAGE VOICE, INC., and SCALI, MCCABE, SLOVES, INC.,

Defendants-Appellants.

Appeals from an order of the Supreme Court (Tyler, J.) entered on September 18, 1974 in the New York County Clerk's office, granting plaintiff's motion to dismiss the affirmative defenses of defendants and denying defendants' cross-motion for summary judgment.

Victor A. Kovner of counsel (Nathaniel J. Bickford with him on the brief; Lankenau, Kovner, Bickford & Beer, attorneys) for defendant-appellant The Village Voice, Inc.

Steven Finell of counsel (Paul J. Newlon with him on the brief; Paul, Weiss, Rifkind, Wharton & Garrison, attorneys) for defendant-appellant Scali, McCabe, Sloves, Inc.

Irwin N. Wilpon, attorney for plaintiff-respondent

NUNEZ, J.

Defendants appeal from an order of Special Term granting plaintiff's motion to dismiss defendants' affirmative defenses and denying defendants' cross-motion for summary judgment. Defendant The Village Voice, Inc., publishes a newspaper called "The Village Voice". In its newspaper it published four articles between August 31, and November 30, 1972, which were highly critical of the plaintiff's performance of his duties as a judicial officer. It is not these articles, however, which are the gravamen for this action. On February 25, 1973, defendants caused an advertisement to be printed in the New York Times. The advertisement was composed by defendant Scali, McCabe, Sloves, Inc., a professional advertising agency. This advertisement referred to the articles about plaintiff in sufficient detail and in such a manner that there can be no question that if the statements made were not accurate and if the defendant enjoyed no privilege, the advertisement would support a cause of action for libel.

Defendants urge that under the doctrine of *New York Times* v. *Sullivan*, 376 U.S. 254, there is no issue as to their privilege. For two reasons we do not agree.

It is correct that *Sullivan* concerned a paid advertisement and the cloak of the First Amendment was nevertheless applied. But the court was careful to point out (at pp. 266, et seq.) the nature of the particular advertisement involved. It was not a commercial advertisement designed to sell a product. On the contrary, it sought financial support for a movement of great public interest and concern, and the court pointed out that the advertiser was doing

what a newspaper could do—exercising its freedom of speech. Not owning a newspaper, the advertiser could not state its views in the editorial section of a paper and so was relegated to a paid advertisement. Advertisements of this kind the court styled "editorial advertisements", and it is advertisements of like kind only that are protected by the constitutional amendment.

The advertisement in suit here was designed solely to sell The Village Voice, the product of the defendant advertiser. The composer of the advertisement, the defendant advertising agency, so claims. It would appear obvious that had the defendant Village Voice wished to convey information other than the desirability of purchasing its paper, it would have used its own columns. Freedom of the press has never been extended to commercial advertising matter (*Valentine* v. *Chrestensen*, 316 U.S. 52). At the very least the record presents an issue as to the character of the publication.

Even assuming the advertisement was privileged, the privilege would not survive a malicious publication. The record shows that between the date of the publication of the original article and the date of publication of the advertisement, the defendant Village Voice received information that its original publication was inaccurate, incomplete, and in many respects totally false. This information came from an apparently reliable source. Here again, an issue is presented precluding summary judgment.

Finally, The Village Voice's defenses of truth and both defendants' contentions that the advertisement was published without malice are sufficiently pleaded. The CPLR

requires only adequate notice of each cause of action or defense. Specific acts intended to be established in support of the pleaded defenses may be obtained by a bill of particulars and by disclosure. It was error to dismiss these defenses and they should be reinstated.

The order entered on September 18, 1974 in the Supreme Court, New York County (Tyler, J.) should be modified on the law so as to reinstate the first and second affirmative defenses and otherwise affirmed, without costs.

All concur.

Appendix B

Opinion of the Court of First Instance

New York Supreme Court, New York County

DOMINIC S. RINALDI,

Plaintiff,

against

THE VILLAGE VOICE, INC. and SCALI, MCCABE, SLOVES, INC.,

Defendants.

ANDREW R. TYLER, J.

This is an action by a public official for libel, and invasion of privacy under Civil Rights Law sections 50 and 51 arising from the publication of an advertisement which appeared in the New York Times on February 25, 1973. The advertisement was prepared by the defendant Scali, McCabe, Sloves, Inc. (Scali) under agreement with the defendant The Village Voice, Inc. (Voice) for the purpose of promoting sales of the New York newspaper known as The Village Voice. The advertisement depicted plaintiff in caricature under a headline "The judge bawled out the cop. And let the pusher go free." It contained statements pertaining to articles concerning the plaintiff which appeared in several publications of The Village Voice and which generally criticized his integrity in the performance of his duties as a justice of the Supreme Court in certain criminal cases. It described the plaintiff as "curiously lenient with heroin dealers and organized crime figures. Very tough on long-haired attorneys, black defendants, on

questions like bail, probation, and sentencing." It acclaimed the newspaper for resourcefulness and initiative in reporting and contained subscription coupons printed at the bottom to be used to buy The Village Voice.

The defendant Voice has interposed affirmative defenses asserting that the material described in the advertisement is of public interest, was published in good faith in the reasonable belief that it was true, without malice, and is constitutionally privileged.

The plaintiff claims the advertisement is purely commercial and moves to dismiss the defenses upon the ground that constitutional privilege with respect to public officials is not afforded to purely commercial material, and upon the further ground that the advertisement portrayed the caricature of the plaintiff for trade purposes without his consent and thereby violated his right of privacy under Civil Rights Law sections 50 and 51. The plaintiff also urges that the defenses of truth and privilege are not sufficiently stated.

The defendant Scali has similarly interposed a defense that the material was prepared by it without malice and in good faith in the belief that it was true and privileged under the Constitution of the United States.

The plaintiff moves to dismiss Scali's defense upon the grounds that the material Scali prepared was a commercial advertisement not constitutionally privileged.

In support of their contentions, the defendants urge, inter alia, that the advertisement is an editorial of news

items protesting official action rather than plain commercial activity in nature, and therefore is constitutionally privileged under the First Amendment to the U.S. Constitution. They further contend that plaintiff has not shown evidence of actual malice in the libel cause of action and that recovery in the second cause of action under the Civil Rights Law is limited by the requirement that statements concerning a public figure must demonstrate that the publication was materially and knowingly falsified, or was uttered with reckless disregard for the truth. The defendants cross-move for summary judgment upon grounds, inter alia, that the plaintiff has not offered proof of knowledge of falsity or reckless disregard as to the truth, and that the complaint fails to particularize the alleged libel as required by CPLR 3016 (a).

The first contention by plaintiff is that the constitutional guarantees of freedom of speech and of the press normally accorded to news media are inapplicable here, at least so far as Voice is concerned, because the allegedly libelous statements were published as part of a paid "commercial" advertisement.

It is well recognized that editorials on the dissemination of news are constitutionally protected. This is so, even if the editorial contains a protest against certain official actions. However, there is a distinction between a "commercial" message and a protest against certain official actions. If the protest message has been added to the "commercial" message, it does not serve to purify the publication but becomes tainted and takes the form of an effort to evade the law (Valentine v. Chrestensen, 316 U.S. 52). A publication is not "commercial" when it communicates in-

formation, expresses opinion, recites grievances, protests claimed abuses, and seeks financial support of its activities. (N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266, See, NAACP v. Button, 371 U.S. 415, 435).

The rationale for concluding that an advertisement is not "commercial" is based upon the need to provide an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. (N.Y. Times Co. v. Sullivan, supra; cf. Lovell v. Griffin, 303 U.S. 444, 452; Schneider v. State, 308 U.S. 147, 164). In other words, criticism of a judge such as here, even if based upon half-truths and misinformation is constitutionally protected, as long as the statements are not embodied in a "commercial" advertisement. (N.Y. Times Co. v. Sullivan, supra, p. 273; cf. Bridges v. California, 314 U.S. 252; Pennekamp v. Florida, 328 U.S. 331).

A fair reading of the defendants' publication reveals that it is clearly intended to solicit continuing readership of The Village Voice newspaper. This solicitation is confirmed by the inclusion of coupons in the advertisement stating "* * * a year's subscription (52 issues) to the Village Voice, I enclose $7." The coupons show a domestic subscription rate of $12. for two years, $16. for three years and $8. for a foreign subscription. The addition of a protest message to the subscription coupons criticizing the performance of the plaintiff in his official duties does not serve to purify the publication but takes the disguised form of an effort to evade the law and thereby infects its

constitutional protection (Valentine v. Chrestensen, supra). Moreover, the defendant Voice, having access to its own publishing facilities, does not need to use the New York Times for the promulgation of information and ideas. It is not deprived of the right to exercise freedom of speech normally accorded to members of the press, since by its very nature it is possessed with its own important outlet for publication (N.Y. Times Co. v. Sullivan, supra). Thus, the statements made in the advertisement while ordinarily protected even if they were half-truths or based upon misinformation, are not privileged when embodied in a commercial advertisement (N.Y. Times v. Sullivan, supra). Accordingly, the third defense of the defendant Voice, relying upon this protection and the defense of the defendant Scali consonant therewith, are fatally deficient and must be stricken.

The plaintiffs urge that the first and second defenses contain a general statement, without facts, that the allegations in the advertisement were published without malice, in good faith, and in the belief that the same were true and with reasonable cause for such belief. A general allegation charging a person with something that is libelous per se cannot be successfully answered by a general allegation in the answer that the charge is true. A statement in the answer that the words are true would not be a justification; it is a statement of nothing. It is a simple repetition of the libel. See, Wachter v. Quenzor, 29 N.Y. 547, 552. The reason for the rule is that it does not give to the plaintiff any clue of what the defendant intends to prove upon the trial. The answer should set forth the facts upon which it is alleged that the allegations of the complaint are

true. Bingham v. Gaynor, 203 N.Y. 27, 34. The answer of the defendants does not set forth the facts.

As to the cause of action based upon Civil Rights Law sections 50 and 51, the Court is cognizant that the privacy of every individual is protected under the statute in that the name, portrait or picture of a living person may not be used for advertising or trade purposes without that person's prior written consent (section 50). The offended person may sue for injunctive, compensatory and exemplary damages (section 51). The statute, however, affords little protection to a newsworthy person unless the report or article is fictitious. No healthy interest is preserved by protecting dissemination of fiction. (Time, Inc. v. Hill, 385 U.S. 374, 387). The constitutional protections for speech and press preclude the application of the New York statute to redress false reports of public interest, unless there is proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth. (Time v. Hill, supra., pp. 387, 388). Calculated falsehood enjoys no immunity in cases of alleged defamation of a public official concerning his official conduct, id., pp. 389, 390.

The use of the name, portrait or picture of a living person in truthfully recounting or portraying an actual current event is not proscribed by Civil Rights Law section 51. The same is true with reference to a past newsworthy event if it bears some relationship to the current event portrayed. (Hill v. Hayes, 18 A.D. 2d 485, 490, aff'd, 15 N.Y. 2d 986). However, if it can be clearly demonstrated that the newsworthy item, even if true, is presented, not for

the purpose of disseminating news, but rather for the sole purpose of increasing circulation, then the rationale for exemption should not apply. Consequently, a defense of qualified privilege is not a defense where it is demonstrated that the article was published for the sole purpose of enhancing sales; id., p. 491. The solicitation of subscriptions contained in the advertisement evinces a clear purpose of enhancing sales. The commercial message taints the publication as a disguised effort to evade the law. (Valentine v. Chrestensen, supra).

The moving and opposing papers contain an ample description of the underlying criminal cases upon which the news stories were based, from which the questionable advertisement was drawn. The contention by defendants that the complaint fails to particularize the libel is without merit since a complete copy of the allegedly libelous material is attached to the complaint as an exhibit. Notwithstanding the efforts of the litigants to be incisive and to elicit an expeditious remedy, the number of factual issues raised as to the truthfulness of the stories or their malicious use, are so sharp and diverse as to make summary disposition incapable. For example, whether the reporter for The Village Voice observed elemental standards of journalism is not determinable at this juncture since those standards are not clearly explained, nor can the truthfulness or malice of statements or knowledge thereof be readily ascertained from reading the papers.

Upon the foregoing, the motion in chief is granted by striking the defenses of defendant Voice, with leave to serve an amended answer within twenty days after service

of a copy of the order to be entered hereon, with notice of entry reasserting the second defense containing a statement of ultimate facts supporting the contention that the advertisement was published without malice (Bingham v. Gaynor, 203 N.Y. 27, 34).

The defense of the defendant Scali is dismissed and the cross motions are denied in all respects.

Settle order.

Appendix C

Order of the Appellate Division of the Supreme Court, First Judicial Department (May 13, 1975)

Present—

Hon. Harold A. Stevens, Presiding Justice,
Arthur Markewich,
Louis J. Capozzoli,
Emilio Nunez,
Paul J. Yesawich, Jr., Justices.

M-953

DOMINIC S. RINALDI,

Plaintiff-Respondent,

against

THE VILLAGE VOICE, INC., and SCALI, MCCABE, SLOVES, INC.,

Defendants-Appellants.

The above named defendants-appellants having moved for leave to appeal to the Court of Appeals from the order of this Court entered on March 11, 1975,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the joint affidavits of Victor A. Kovner and Steven Finell, and the affidavits of James C. Goodale, Edward R. Cony and Edward A. Miller, respectively, in support of said motion, the affidavit of Irwin N. Wilpon in opposition thereto, and after hearing Messrs. Victor A. Kovner, Steven Finell and Edward A. Miller for the motion, and Mr. Irwin N. Wilpon opposed,

It is ordered that said motion be and the same is hereby denied with $20 costs.

ENTER:

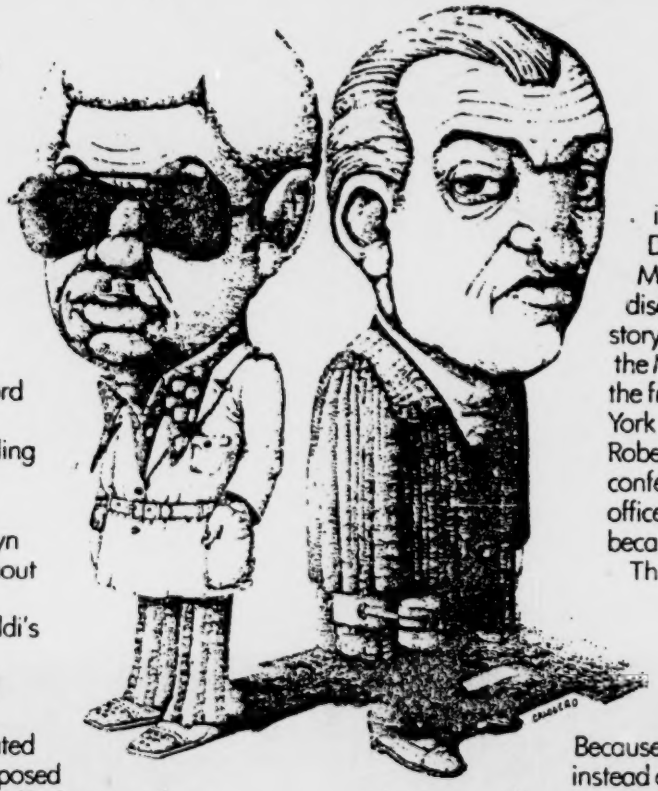
HYMAN W. GAMSO
Clerk.

Appendix D

The Advertisement in Suit

(See Opposite ☞)

The judge bawled out the cop. And let the pusher go free.



The pusher's crimes against society are widely known.

But the judge's activities against society aren't.

The facts are alarming.

That's why The Village Voice decided to bring them before the public.

We broke Jack Newfield's story in August, several weeks before any other publication.

A heroin pusher with a record of 18 arrests and assorted convictions was charged with selling heroin and attempting to bribe a police officer.

Justice Rinaldi of the Brooklyn Supreme Court released him without bail.

But even stranger than Rinaldi's handling of the pusher was his handling of the cop who arrested the pusher.

Rinaldi yelled at and humiliated the cop...in effect abusing the supposed bribee while allowing the supposed briber to go free.

Strange behavior for a man supposed to be meting out justice?

It gets stranger. Justice Rinaldi has a whole record of curious behavior, as the New York Times and New York Magazine reported in their studies several weeks later.

Curiously lenient with heroin dealers and organized crime figures. Very tough on long-haired attorneys, black defendants, on questions like bail, probation and sentencing.

Obviously Rinaldi is not the only questionable judge in New York. Our judicial system could be riddled with them.

There are several ways to eliminate such judges. First of course, by voting them out of office. Then through criminal indictment and trial, impeachment by the State Legislature or trial on competency by a judicial court.

And the only way any of those can happen is if people start causing an uproar.

We applaud the New York Times study. But we're even prouder that The Village Voice spoke out first.

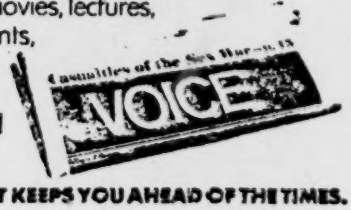
In fact, that's why our readers read The Voice.

Take the now-famous investigation of Queens District Attorney Thomas Mackell. The day following the disclosure of Joseph Ferdinando's story in the August 3rd Voice, the Mackell investigation was on the front page of all three New York dailies. And U.S. Attorney Robert Morse held a press conference to announce his office's investigation of Mackell because, as he said, The Voice was about to break the story.

You can find stories like these (and follow-up reports) every week in The Village Voice. Because we go out and find the news instead of just waiting to report it.

So if you really want to know what's going on in politics, theatre, music, art, movies, lectures, movements, community events, get The Voice.

You'll find out not only what's happening. You'll find out what's about to happen.



IT KEEPS YOU AHEAD OF THE TIMES.

Use this coupon for yourself

The Village Voice, c/o Department S, 80 University Place, New York, N.Y. 10003. Please send me a year's subscription (52 issues) to The Village Voice. I enclose $7.

NAME

ADDRESS CITY

STATE ZIP

$7 1 YR $12 2 YRS $16 3 YRS FOREIGN $8 1 YR

2/25

Pass this coupon on to a friend or be a nice person and give your friend a Gift Subscription

The Village Voice, c/o Department S, 80 University Place, New York, N.Y. 10003. Please send me a year's subscription (52 issues) to The Village Voice. I enclose $7.

FROM

NAME

ADDRESS CITY

STATE ZIP

$7 1 YR $12 2 YRS $16 3 YRS FOREIGN $8 1 YR

2/25

Appendix E

Letter

[LETTERHEAD OF]

BROOKLYN BAR ASSOCIATION
123 Remsen Street
Brooklyn, N. Y. 11201

November 28, 1972

The Village Voice
80 University Place
New York, N. Y. 10003

Attention: Daniel Wolf, Editor

Gentlemen:

In your issue of October 12 you published an article entitled "Judge Corso and the Mafia." The two judges mentioned are members of the bench in Kings County.

The Board of Trustees of the Brooklyn Bar Association directed me as President to appoint a Committee to investigate the charges made in your magazine. I now have the results of the investigation which discloses that the facts reported by the author are inaccurate, incomplete and in many cases are totally incorrect. The sources from which we obtained our information were equally available to your reporter and it is regrettable that he did not take the time to investigate fully or properly.

Very truly yours,

BROOKLYN BAR ASSOCIATION

/s/ EDWARD J. CONNOLLY

Edward J. Connolly,
President

EJC:sb

Appendix F

Affidavit of James C. Goodale in Support of Motion for Leave to Appeal

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

New York County Index No. 8824/73

Docket No. 1760

DOMINIC S. RINALDI,

Plaintiff-Appellee,

against

THE VILLAGE VOICE, INC., and SCALI, MCCABE, SLOVES, INC.,

Defendants-Appellants.

State of New York)
County of New York) ss.:

JAMES C. GOODALE, being duly sworn, deposes and says:

1. I am Executive Vice President of The New York Times Company. I am fully familiar with all the facts and circumstances relating to this motion.

2. This affidavit is submitted in support of the defendants' motion for leave to appeal the decision of the Appellate Division to the Court of Appeals.

3. The New York Times Company (the "Times") is the publisher of *The New York Times*, a daily newspaper

with a nationwide daily circulation of about 850,000 copies and a Sunday circulation of about 1,500,000 copies. The Times carries advertising by other publications intended to increase their circulation. Indeed, the advertisement by the *Village Voice,* which is the subject of this controversy, was published in The Times. The Times publishes the largest amount of advertising by other publications of any newspaper in America. Therefore, it is apparent that the Times has a direct legal and financial interest in the enunciation of a legal doctrine in this area. However, the strongest motivation for the Times submitting this affidavit is its historical role in proclaiming and defending the rights of the free press. The Times believes that this case is a threshold case under the First Amendment which will determine the future nature of media advertising in this State and, perhaps, the nation.

4. The Times itself does promotional advertising through other media by presenting part of the content of the newspaper. Any newspaper when it shows the public what is contained in one of its issues is not merely seeking to obtain or maintain circulation, the lifeblood of the medium. It is exhibiting to potential new readers what facts, values, tastes, subjects, quantity and standards are found in its publication. This is done as much out of pride, conviction and concern for the common weal as for the purpose of increasing the consumption of a "product." In some promotional advertisements, the account of part of the contents of the paper serves the same purpose as an article in a law review or in a medical journal.

5. *The Village Voice* advertisement is an example of advocacy advertising. The advertisement is critical of a

public official and advocates methods by which malfeasant public officials in similar positions can be removed from office. The advertisement speaks of the pride of the Voice in dealing with the subject matter before other publications. Just as the learned professions of law and medicine take pride in reporting to the world what they have accomplished, newspapers have the same feeling and practice. The fact that the Voice advertisement ends with a subscription coupon does not obviate the fact that most of the advertisement constitutes an expression of a viewpoint and a demand for community action. Were the language in the advertisement to appear in an editorial in the *Village Voice*, no court would have any question but that the words were protected by the First Amendment. The language does not lose its public significance because it appears in an advertisement which includes a solicitation. By analogy, the protection which the Constitution gives to freedom of religion is not lost because a preacher bids his listeners to attend his church, to contribute funds to it, or asks that religious literature be purchased. See *Jamison* v. *Texas*, 318 U.S. 413 (1943) and *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943).

It is universally agreed that the manner in which a particular judge functions, or in which the judicial system functions, is a problem of great public interest and one which demands the protection of free debate in our open society. That this debate takes place in an advertisement with a commercial solicitation rather than in an editorial makes it no less valuable and no less worthy of the constitutional umbrella.

6. Because of its content, the *Village Voice* advertisement, in a libel action and in an invasion of privacy action, is entitled to be viewed in light of the doctrines enunciated in *New York Times* v. *Sullivan,* 376 U.S. 254 (1964); *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967); and *Booth* v. *Curtis Publishing,* 15 A.D.2d 343 (1st Dep't), aff'd w/o opinion, 11 N.Y.2d 907 (1962).

7. Should the Appellate Division's finding that the Voice advertisement is without the protection of the *Sullivan* doctrine remain the law, there is another group of "promotional" material which could lose the *Sullivan* protection. As part of its home delivery subscription campaign, the Times publishes a sixteen-page replica which is delivered to homes. There is a subscription coupon in this replica. In addition, direct mailings are made to advertising agencies, manufacturers, retailers and other potential advertisers of the complete daily newspaper, sections of it, or re-prints of particular articles. Such distribution has the limited purpose of gaining subscribers and advertisers. These publications necessarily fall within the protection of the *Sullivan* and *Hill* doctrines.

8. The important issue in this case should not be decided on the ground that because an advertisement includes the purpose of enhancing sales, it therefore is automatically labeled "commercial speech" and removed from the coverage of the First Amendment. If enhancement of sales is to be the core of whether expression receives First Amendment protection, then many front pages of America's leading newspapers could be said to be without First Amendment protection. As Justice Douglas stated in his concur-

ring opinion in *Cammarano* v. *U.S.*, 358 U.S. 498 (1958), at 514:

> "The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive."

9. Even if the *Village Voice* advertisement is approached as a pure advertising piece, it has been pointed out that "even advertisers enjoy First Amendment rights." *Fur Information and Fashion Council, Inc.* v. *E. F. Timme & Son, Inc.*, 364 F.Supp. 16 (S.D.N.Y. 1973). In *Fur Information*, the defendants sponsored television advertisements for artificial fur coats. Part of the advertisements were critical of the fur industry's alleged lack of concern for endangered species. The Court concluded that the defendant sought to capitalize on the issues of ecology and environmentalism and held that it did not lose its First Amendment rights in so doing.

10. The meaning of *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942) need not be explored in this case since a clear reading of the *Village Voice* advertisement demonstrates that "it communicated information, expressed opinion, recited grievances, protested claimed abuses. . . ." *New York Times* v. *Sullivan supra*, at 266. That the advertisement also sought subscriptions is irrelevant.

11. Because of the importance of this case in the historic development of the law concerning freedom of the press, the Times urges the Appellate Division to grant leave to the defendants to appeal to the Court of Appeals.

/s/ JAMES C. GOODALE
James C. Goodale
Executive Vice President

(Sworn to April 2, 1975.)

Appendix G

Affidavit of Edward R. Cony in Support of Motion for Leave to Appeal

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 8824/73

DOMINIC S. RINALDI,

Plaintiff,

against

THE VILLAGE VOICE, INC., and SCALI, MCCABE, SLOVES, INC.,

Defendants.

State of New York)
County of New York) ss.:

Edward R. Cony, being duly sworn, deposes and says:

1. I am Vice President and Executive Editor of Dow Jones & Company, Inc. ("Dow Jones"). This affidavit is submitted in support of the Defendants' motion for leave to appeal the decision of the Appellate Division herein to the Court of Appeals.

2. Dow Jones is the publisher of, *inter alia,* The Wall Street Journal, Barron's National Financial and Business Weekly and The National Observer, all of which are distributed throughout the United States and abroad. All said Dow Jones publications carry paid advertising de-

signed to increase advertising in or circulation of other publications. Dow Jones similarily seeks to enlarge the advertising in and circulation of Dow Jones publications by placing advertisements therefor in non-Dow Jones publications.

3. In attempting to sell a product of whatever nature through advertising it is of course usual to describe the product or to display pictures of it or both so that the reader will be able to determine whether he wishes to purchase it. A publisher's product is the words and pictures that comprise its publications. When a publisher wishes to stimulate sale of its publication or advertising therefor, it will place advertising containing descriptions or examples of the product being sold. Publishers place such advertising in other publications in order that it will be seen by prospective purchasers who are not readers of the publication being advertised.

4. Thus, Dow Jones has followed the practice of placing in other publications advertisements which in whole or in part consist of material first published in Dow Jones publications. Dow Jones believes that readers of the advertisements, upon becoming aware of the contents of the Dow Jones publications, will wish to purchase them or advertising space in them. For example, Dow Jones from time to time has republished the entire front page of the Eastern Edition of The Wall Street Journal in the same day's edition of The New York Times. As further example, Dow Jones from time to time has published as advertisements in other publications editorials on matters of public interest originally appearing in Dow Jones publications

where Dow Jones believes that the editorials are of unusual quality or interest.

5. One reason Dow Jones places such advertising, as outlined above, is to stimulate advertising and circulation revenue, but another significant purpose and substantial effect of such advertising is to disseminate news, information and opinion among vast numbers of people who, as non-readers of Dow Jones publications, would otherwise not receive it.

6. When Dow Jones initially publishes news, articles and editorials it does so under the protection of the First and Fourteenth Amendments to the United States Constitution as interpreted by the United States Supreme Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny. Our attorneys advise us that, according to the opinion of the Appellate Division in the instant case, such protection is entirely lost when the same material is published in advertising form.

7. As a matter of fact, the result of the apparent stripping away of constitutional protection by the Court is that Dow Jones has curtailed and may well feel impelled to continue to curtail commercial advertising, both in its publications and for its publications, where such advertising consists of reproduced or summarized news, articles or editorials. Presumably other publishers will be led to act similarly. The result will not only be to reduce revenue for Dow Jones and the other publishers and to restrict seriously this highly effective and beneficial method of advertising, but, more important, to reduce materially the

flow of information and opinion which such advertisements represent.

8. Finally, Dow Jones, like other newspaper publishers, distributes copies or portions of its publications to selected audiences for the purpose of encouraging the recipients to purchase the publications or advertising in them. It is difficult to distinguish conceptually between the legal significance of the distribution of a portion of a publication in the form of an advertisement and the distribution of the entire publication for advertising purposes. Such distribution of an entire or part of a publication might well be deemed to be "commercial advertising" within the reasoning of the Appellate Division. Therefore we fear that some or all of the contents of publications thus disseminated as advertising will be deemed to be without First Amendment protection. The result would be to eliminate or restrict sharply this common practice which is otherwise beneficial both to publishers and readers.

9. Because of what we believe will be the dramatic and deleterious effect of the decision and opinion of the Appellate Division herein, we respectfully urge that leave to appeal to the Court of Appeals be granted.

/s/ Edward R. Cony

(Sworn to April 1, 1975.)

Appendix H

Affidavit of Edward A. Miller in Support of Motion for Leave to Appeal

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

New York County Index No. 8824/73

Docket No. 1760

DOMINIC S. RINALDI,

Plaintiff-Appellee,

against

THE VILLAGE VOICE, INC., and SCALI, MCCABE, SLOVES, INC.,

Defendants-Appellants.

State of New York)
County of New York) ss.:

EDWARD A. MILLER, being duly sworn, deposes and says:

1. I am General Counsel to Harper & Row, Publishers, Inc., and am familiar with the facts and circumstances relating to this motion.

2. This affidavit is submitted in support of the defendants' motion for permission to appeal the decision of the Appellate Division to the Court of Appeals.

3. Harper & Row, Publishers, Inc. ("Harper & Row") is the publisher of approximately 1700 books per year, including both fiction and non-fiction, the latter of which include many books about current subjects of public interest involving public figures and public officials.

4. When Harper & Row initially publishes books dealing with public officials, public figures and matters of public interest, it does so under the protection of the First and Fourteenth Amendments to the United States Constitution as defined in *New York Times* v. *Sullivan,* 376 U.S. 254 (1964) and its progeny.

5. An essential phase of the business of Harper & Row is the advertising and promotion of its books. Harper & Row occasionally takes advertisements which summarize portions of the books it has published and, in addition, engages in a wide variety of publicity efforts designed to attract public attention to the content of its books.

6. The opinion of the Appellate Division in this case apparently raises serious questions as to whether or not the protection of *New York Times* v. *Sullivan* is lost when portions of a book are republished in advertising form.

7. Harper & Row will have to reconsider the advertising and promotional efforts it employs where such advertising consists of reproduced or summarized versions of material appearing in book form. Presumably, other book publishers will be forced to undertake a similar review of their policies.

8. In view of the serious consequences of the decision of the Appellate Division in this case we respectfully urge that permission to appeal to the Court of Appeals be granted.

/s/ Edward A. Miller
Edward A. Miller

(Sworn to April 8, 1975)